

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF PERMIT)
TO APPROPRIATE WATER)
14538-g41H GRANTED TO)
HERBERT A. POTTS)

FINAL
ORDER

* * * * *

On August 20, 1992, the Department of Natural Resources and Conservation (Department), pursuant to the Montana Water Use Act, Mont. Code Ann. Title 85, Chapter 2 (1991), and the Montana Administrative Procedure Act, Mont. Code Ann. Title 2, Chapter 4, Part 6 (1991), gave notice that a show cause hearing in the above-entitled matter would be held on September 21, 1992. The purpose of this hearing was to allow the Permittee to show cause why the Department should not implement the Revocation Order stated below, which has been drafted pursuant to Mont. Code Ann. § 85-2-314 (1991). The Notice of Hearing was sent to the Permittee by certified mail, return receipt requested. The receipt was returned to the Department on August 26, 1992. It indicates that the Notice of Hearing was delivered August 25, 1992.

In the Notice of Hearing the Permittee was ordered to inform the Hearing Examiner in writing by September 4, 1992, whether he intended to appear and show cause at the hearing. The Notice of Hearing notified the Permittee that, pursuant to Mont. Admin. R. 36.12.208 (1991), the failure of the Permittee to timely notify the Hearing Examiner of Permittee's intent to appear would result

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in entry by the Hearing Examiner of the Department's Final Order revoking the subject permit.

As of September 14, 1992, the Permittee had made no contact with the Hearing Examiner. Therefore, the September 21, 1992, hearing in this matter is hereby vacated and the Department's Final Order in this matter is entered as follows.

FINAL ORDER REVOKING
PERMIT TO APPROPRIATE WATER 14538-g41H

Pursuant to the Water Use Act, Mont. Code Ann. § 85-2-314 (1991), the Department makes the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. On August 7, 1979, the Department issued Permit to Appropriate Water 14538-g41H to Herbert A. Potts. The Department specified on the Permit the time limit for completion of the diversion and distribution works and the beneficial use of the water to be August 1, 1981.

2. Applicant filed a Notice of Completion of Water Development on September 22, 1980.

3. Staff from the Department's Bozeman Field Office conducted a field verification inspection of the permitted appropriation on October 15, 1985, as a means of determining that the appropriation had been completed in substantial accordance with the Permit prior to issuing Permittee a certificate of water right. The inspector observed an eight-inch capped well which

was not in use and was not outfitted with a pump. The permitted place of use did not show any effect of irrigation. The inspection showed that no water had been put to beneficial use. Accordingly, staff recommended this Permit be revoked.

4. On December 3, 1985, Permittee was notified in writing of staff's recommendation to revoke this Permit. Permittee responded by letter of December 7, 1985, to the Department's staff recommendation stating that he did not agree with the recommendation. The letter describes a pump Permittee had and goes on to state: "at this point in time, the agricultural economy does not allow for pumping water for marginal grassland." No information was provided supporting use of the well for the permitted purpose at any time during the six and a half years since the permit was issued. The Department made several attempts over the next few years to obtain information from Permittee showing the well had been used for the permitted purpose.

5. An informal conference was held on March 7, 1991, to attempt to resolve the difference of opinion on whether this Permit had been perfected. The conference included Permittee and staff from the Department's Bozeman Field Office. The conference was conducted by a designee appointed by the Administrator of the Department's Water Resources Division. A visit to the site of the permitted appropriation was made in conjunction with the conference. As a result of the conference it was determined and agreed by all that during the next irrigation season Permittee would assemble and operate the system he alleged he had, and in

the manner he alleged he had operated it in the past. It was further agreed that such a demonstration, if successful, would be adequate support for his contention that the Permit had been perfected.

6. Permittee failed to contact the Department for the agreed upon demonstration of the system.

7. On December 17, 1991, staff of the Department's Bozeman Regional Office renewed their recommendation that Permit 14538-g41H be revoked.

8. On June 3, 1992, the Supervisor of the Department's New Appropriations Program notified Permittee of the renewed recommendation and of the Department's intent to revoke the Permit. The notification was sent certified mail, return receipt requested, and the receipt was returned with Permittee's signature.

The notification provided Permittee nine days within which to contact the Department to schedule another opportunity to demonstrate his system. It also provided Permittee sixteen days within which to contact the Department to request a hearing on the proposed revocation.

9. As of August 7, 1992, Permittee had not contacted the Department.

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and the parties hereto. Mont. Code Ann. Title 85, Chapter 2 (1991).

2. The Department had at the time of the field verification of the subject permitted appropriation, and continues to have, the authority to inspect permitted appropriations to determine that the appropriation had been completed in substantial accordance with the Permit prior to issuing Permittee a Certificate of Water Right. Mont. Code Ann. § 85-2-315 (1985).

3. The Department has complied with the requirements of Mont. Admin. R. 36.12.806 (1991). See Finding of Fact 5. Mont. Admin. R. 36.12.806 (1991) states:

(1) If an appropriator disagrees with the department's recommendation he may request an informal conference to discuss the items in disagreement and to present further information that supports his position. The water resources division administrator or his designee shall conduct the conference.

(2) If the appropriator presents information that adequately supports his position and refutes the department's recommendation, the department may alter its recommendation accordingly.

(3) If no additional information by the appropriator rebuts the recommendation, the department shall advise the appropriator of the formal administrative hearing process and allow the appropriator to request a formal hearing.

4. The Department has the power to revoke a permit to appropriate water. Mont. Code Ann. § 85-2-314 (1991) states:

If the work on an appropriation is not commenced, prosecuted, or completed within the time stated in the permit or an extension thereof or if the water is not being applied to the beneficial use contemplated in the permit or if the permit is otherwise not being followed, the department may, after notice, require the permittee to show cause why the permit should not be modified or revoked. If the permittee fails to show sufficient cause, the department may modify or revoke the permit.

5. The Department has reason to revoke Permit to Appropriate Water 14538-g41H. Mont. Code Ann. § 85-2-314 (1991); Mont. Admin. R. 36.12.808 (1991); see Findings of Fact 1, 3, 5, and 6.

6. The Department gave proper notice of its intent to revoke Permit 14538-g41H, and all relative substantive and procedural requirements of law or rule have been fulfilled. See Findings of Fact 3, 4, 5, 6, 7, and 8.

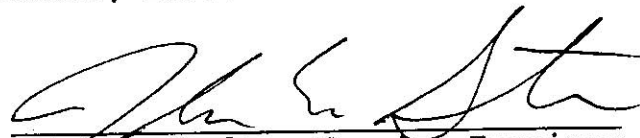
ORDER

Permit to Appropriate Water 14538-g41H issued August 7, 1979, to Herbert A. Potts is hereby revoked.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

Dated this 16th day of September, 1992.



John E. Stults, Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6612

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 16th day of September, 1992, as follows:

Herbert A. Potts
80730 Gallatin Road
Bozeman, MT 59715

Scott Compton, Manager
Bozeman Water Resources
Division Regional Office
111 North Tracy
Bozeman, MT 59715
(via electronic mail)


Cindy G. Campbell
Hearings Unit Legal Secretary

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF PERMIT)	NOTICE OF PROPOSAL TO REVOKE,
TO APPROPRIATE WATER)	NOTICE OF SHOW CAUSE HEARING,
14538-g41H GRANTED TO)	AND APPOINTMENT OF
HERBERT A. POTTS)	HEARING EXAMINER

* * * * *

I.
NOTICE OF SHOW CAUSE HEARING

The Department of Natural Resources and Conservation (Department) pursuant to the Montana Water Use Act, Mont. Code Ann. Title 85, Chapter 2 (1991), and specifically Section 85-2-314, and the Montana Administrative Procedure Act, Mont. Code Ann. Title 2, Chapter 4, Part 6 (1991), hereby orders and gives notice that a show cause hearing in the above-entitled matter will be held on Monday, September 21, 1992, beginning at 10:00 a.m., in Room 44 of the Lee Metcalf Building, 1520 East Sixth Avenue, Helena, Montana. The hearing will be held before John E. Stults, Hearings Examiner for the Department, who will make the final decision in this matter. The purpose of this hearing is to allow the Permittee to show cause why the Department should not implement the Revocation Order stated below, which has been drafted pursuant to Mont. Code Ann. § 85-2-314 (1991). You may present factual evidence and arguments as to why the Permit should not be revoked. You may represent yourself or obtain legal counsel. The hearing procedures will be governed by Mont. Code Ann. Title 2, Chapter 4, Part 6 (1991), and by Mont. Admin.

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R. Title 36, Chapter 12, Part 2 (1991). Formal proceedings may be waived pursuant to Mont. Code Ann. § 2-4-603 (1991).

Permittee is hereby ordered to inform the Hearing Examiner in writing by September 4, 1992, whether he intends to appear and show cause at the hearing. Permittee is hereby notified that, pursuant to Mont. Admin. R. 36.12.208 (1991), the failure of the Permittee to timely notify the Hearing Examiner of Permittee's intent to appear, or, having given timely notice of intent to appear, Permittee fails to appear, the Hearing Examiner shall enter a final order revoking the permit.

II.

APPOINTMENT OF HEARING EXAMINER

The Department hereby appoints John E. Stults as Hearing Examiner and final decision-maker in the above-entitled matter. Any questions or motions should be directed to the Hearing Examiner at 1520 East Sixth Avenue, Helena, Montana 59620-2301, telephone number (406) 444-6612.

Disqualification of the Hearing Examiner is provided for in Mont. Code Ann. § 2-4-611(4) (1991).

III.

NOTICE OF PROPOSAL TO REVOKE
PERMIT TO APPROPRIATE WATER 14538-g41H

The Department hereby gives notice that it proposes to issue the following Revocation Order effective September 15, 1992, unless good cause is shown why Permit to Appropriate Water 14538-g41H should not be revoked.

Pursuant to the Water Use Act, Mont. Code Ann. § 85-2-314 (1991), the Department makes the following Findings of Fact, Conclusions of Law, and Proposed Order.

FINDINGS OF FACT

1. On August 7, 1979, the Department issued Permit to Appropriate Water 14538-g41H to Herbert A. Potts. The Department specified on the Permit the time limit for completion of the diversion and distribution works and the beneficial use of the water to be August 1, 1981.

2. Applicant filed a Notice of Completion of Water Development on September 22, 1980.

3. Staff from the Department's Bozeman Field Office conducted a field verification inspection of the permitted appropriation on October 15, 1985, as a means of determining that the appropriation had been completed in substantial accordance with the Permit prior to issuing Permittee a certificate of water right. The inspector observed an eight-inch capped well which was not in use and was not outfitted with a pump. The permitted place of use did not show any effect of irrigation. The inspection showed that no water had been put to beneficial use. Accordingly, staff recommended this Permit be revoked.

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goes on to state: "at this point in time, the agricultural economy does not allow for pumping water for marginal grassland." No information was provided supporting use of the well for the permitted purpose at any time during the six and a half years since the permit was issued. The Department made several attempts over the next few years to obtain information from Permittee showing the well had been used for the permitted purpose.

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6. Permittee failed to contact the Department for the agreed upon demonstration of the system.

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9. As of August 7, 1992, Permittee had not contacted the Department.

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and the parties hereto. Mont. Code Ann. Title 85, Chapter 2 (1991).

2. The Department had at the time of the field verification of the subject permitted appropriation, and continues to have, the authority to inspect permitted appropriations to determine that the appropriation had been completed in substantial accordance with the Permit prior to issuing Permittee a Certificate of Water Right. Mont. Code Ann. § 85-2-315 (1985).

3. The Department has complied with the requirements of Mont. Admin. R. 36.12.806 (1991). See Finding of Fact 5. Mont. Admin. R. 36.12.806 (1991) states:

(1) If an appropriator disagrees with the department's recommendation he may request an informal conference to discuss the items in disagreement and to present further information that supports his position. The water resources division administrator or his designee shall conduct the conference.

(2) If the appropriator presents information that adequately supports his position and refutes the department's recommendation, the department may alter its recommendation accordingly.

(3) If no additional information by the appropriator rebuts the recommendation, the department shall advise the appropriator of the formal administrative hearing process and allow the appropriator to request a formal hearing.

4. The Department has the power to revoke a permit to appropriate water. Mont. Code Ann. § 85-2-314 (1991) states:

If the work on an appropriation is not commenced, prosecuted, or completed within the time stated in the permit or an extension thereof or if the water is not being applied to the beneficial use contemplated in the permit or if the permit is otherwise not being followed, the department may, after notice, require the permittee to show cause why the permit should not be modified or revoked. If the permittee fails to show sufficient cause, the department may modify or revoke the permit.


5. The Department has reason to revoke Permit to Appropriate Water 14538-g41H. Mont. Code Ann. § 85-2-314 (1991); Mont. Admin. R. 36.12.808 (1991); see Findings of Fact 1, 3, 5, and 6.

6. The Department gave proper notice of its intent to revoke Permit 14538-g41H, and all relative substantive and procedural requirements of law or rule have been fulfilled. See Findings of Fact 3, 4, 5, 6, 7, and 8.

PROPOSED ORDER

Permit to Appropriate Water 14538-g41H issued August 7, 1979, to Herbert A. Potts is hereby revoked.

Dated this 19 day of August, 1992.



Gary Fritz, Administrator
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6605

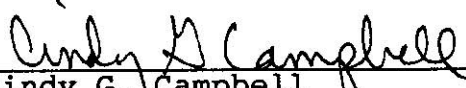
CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Notice of Proposed Revocation Order and Show Cause Hearing, and Appointment of Hearing Examiner was duly served upon all parties of record, certified mail, return receipt requested, at their address or addresses this 20th day of August, 1992, as follows:

Herbert A. Potts
80730 Gallatin Road
Bozeman, MT 59715

Scott Compton, Manager
Bozeman Water Resources
Division Regional Office
111 North Tracy
Bozeman, MT 59715
(via electronic mail)

John E. Stults,
Hearings Officer
Department of Natural
Resources & Conservation
1520 East Sixth Avenue
Helena, MT 59620-2301



Cindy G. Campbell
Hearings Unit Legal Secretary